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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~710~~ 37

IN THE MATTER OF THE FLORIDA EAST COAST RAILWAY CO.,
Debtor,

W. G. WELBON, E. N. CLAUGHTON, and A. W. CORBETT,
Petitioners,

vs.

ATLANTIC COAST LINE RAILROAD CO.,
Respondent.

BRIEF OF THE RESPONDENT, ATLANTIC COAST LINE RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 15, 1953

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Respondent.

BRIEF OF THE RESPONDENT, ATLANTIC COAST LINE RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This petition relates to the same order of the Court of Appeals, Fifth Circuit, as Nos. 670, 702 and 705.

OPINIONS BELOW.

The opinions of the Courts and the reports and orders of the Interstate Commerce Commission are referred to in the petitioners' brief (p. 14-15). Further detail will be found in the respondent's brief in No. 670 (p. 2-4).

The Record.

The petitioners refer to the six volumes, I to VI, now before this Court in No. 670. They attach to their petition a copy of the opinion of the Court of Appeals on the prior appeal (179 F. 2d 538); a copy of their petition for a rehearing of the Court of Appeals' order reversing Judge

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STRUM; and a copy of the order of the Court of Appeals dated March 2, 1953, denying the petition for rehearing.

They make no reference to the unprinted portions of the record which were before the Court of Appeals and are now before this Court in No. 670. However, we assume that the unprinted record will be deemed before this Court in connection with the petition.*

JURISDICTION.

This Court's jurisdiction is invoked under 28 U. S. C. § 1254.

THE QUESTIONS PRESENTED.

The questions presented by the petitioners are referred to later herein under the Argument.

STATUTE INVOLVED.

The statute involved is Section 77 of the Bankruptcy Act (11 U. S. C. § 205). The pertinent portions will be found in Appendix A to the respondent's brief in No. 670.

STATEMENT OF THE CASE.

The petitioners' statement of the case incorporates by reference (p. 16) the portion of the petition which follows the heading "SUMMARY STATEMENT" (p. 1-11).

The object of the petitioners' Summary Statement: the relationship of the Summary Statement to the Questions Presented.

The petitioners' questions presented read almost like pure questions of law, in connection with which an 11-page

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* A notice served by the petitioners on counsel for the respondent contains the following paragraph:

> "The petition makes a part thereof by reference the record now before the Court upon petition for certiorari by St. Joe Paper Company et al., No. 670 October Term, 1952, in which you are counsel for the respondent, and prays reference to that record in support of the petition in the instant cause."

This would seem to cover the unprinted portions of the record.

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"SUMMARY STATEMENT" would be wholly unnecessary. But in the statement of the questions presented there are suggestions of the theme of the petition and brief (p. 11-12).

That theme is that the Commission and the Court of Appeals have been arbitrary and that the so-called "minority bondholders" of the Florida East Coast will suffer if the Commission's Plan be consummated.

The petitioners repeat the erroneous statement, several times made by Judge Strum and by the petitioners in Nos. 670 and 702, that the Plan is opposed by the holders of more than 99% in amount of the Bonds.

As we showed in the respondent's brief in No. 670 (p. 10-12), there is no warrant for the petitioners' statement that the Plan was "objected to in the District Court on behalf of holders of more han 99% in amount of the 5% bonds" (p. 9; see also p. 7).

If there had been a good case on the merits against the Commission's Plan, the appellees in the Court of Appeals and the petitioners in this Court would doubtless have scorned to stand on Judge STRUM's finding that the Plan is opposed by holders of 99% in amount of the Bonds. For that finding is demonstrably "without support in law or in fact".*

While professing to speak for the "minority bondholders" generally, the petitioners (like the petitioners in Nos. 670, 702 and 705) make no effort to show that the Court of Appeals was wrong in finding, in effect, that the Commission's Plan is favorable to the bondholders as a class and hence favorable to the minority bondholders.

In the respondent's brief in No. 670 we quoted the findings of the majority of the Court of Appeals which

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* Not all of the appellees below or all of the petitioners in this Court have tried to stand on Judge STRUM's finding. As we noted in the respondent's memorandum in No. 705, the Successor Mortgage Trustees do not contend that the Plan is opposed by the holders of 99% in amount of the Bonds.

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are to the effect that the Plan is not merely fair, but distinctly favorable, to the holders of the First and Refunding Mortgage Bonds as a class (p. 9). Also, in discussing Judge STRUM's findings, and the Judge's disregard of the Commission's fair market value findings and the fair market value evidence in the District Court, we sketched briefly some of the principal features of the overwhelming showing that the Plan is favorable to the bondholders as a class (p. 53-57). The petitioners make no effort to show that the Court of Appeals was wrong. Instead they quote Judge STRUM's statement that the Plan "does not afford due recognition to the rights of the 5% bondholders, *particularly the minority groups* (p. 2; emphasis supplied by the petitioners) and refer to his holding that the "$20,000,000 of minority 5% bondholders" should not "be penalized by the Commission's apprehensions as to the public interest" (petition p. 9-10 footnote; I, 164;* 103 F. Supp. 845). In addition, they quote in a footnote (p. 9) Judge STRUM's reference to "the distinct prejudice of the $20,000,000 of minority 5% bondholders" and his statement that the Plan is particularly unfair to "the minority groups, who are innocent bystanders caught between the upper and neither millstone, and who now, like ancient Odysseus, drift helplessly between Scylla and Charybdis, hoping to be rescued" (I, 141; 103 F. Supp. 835).

The words "penalized" and "distinct prejudice" which Judge STRUM used imply that the Plan is economically disadvantageous to the "$20,000,000 of minority 5% bondholders". But at most Judge STRUM merely expressed an ultimate conclusion. He did not mention the Commission's findings or the evidence. He left the whole subject of the *economic effect of the Plan* severely alone except for repeated statements which were substantially to

* In this and similar citations the Roman numerals refer to the volume of the printed record and the Arabic numbers to the page.

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the effect that it made no difference how valuable the cash and securities which the Atlantic Coast Line would provide under the Plan might be (see respondent's brief in No. 670, p. 55-57). He said that it was immaterial if the securities of the Atlantic Coast Line had "an *ostensible value*" equal to that of the present securities of the debtor railroad" and he most distinctly implied that any of the securities of the Atlantic Coast Line, of whatever amount, calibre and market value, would be "unwanted" and unacceptable because they are "of fluctuating and debatable value" (*id.*).

It is unthinkable that, if the various petitioners for certiorari could show by the record that the so-called "minority bondholders" would in fact be penalized under the Commission's Plan, they would have relied in the Court of Appeals, and would rely now, merely on what Judge STRUM said in his opinion.

Yet we now have four petitions and briefs in Nos. 670, 702, 705 and 710 totaling 81 pages, exclusive of appendices, and in all 81 pages there is no effort to show that in fact the Florida East Coast bondholders would be penalized economically under the Plan—no effort to show that the Court of Appeals was wrong in finding that the Plan is fair to all of the bondholders.

While the petitioners compliment Judge STRUM for his "exhaustive" opinion, they criticize Chief Judge HUTCHESON's opinion as containing "dogmatic assertions" and "dogmatic conclusions" (p. 10). We do not know whether the word "dogmatic" is used in an invidious sense; if it is, its use is unwarranted. In this connection it is sufficient to refer to the respondent's brief in No. 702 at pages 6-9.

The Petitioners: The Welbon (Claughton) Group.

The petitioners purport to speak for the "minority bondholders" generally.

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Consequently the data about the Welbon (Claughton) Group in Appendix B to the respondent's brief in No. 670 (p. ix-xi) is pertinent. It reveals, among other things, *first,* that the leader of the Group, E. N. Claughton, has been a very heavy and active speculator in the First and Refunding Mortgage Bonds, his holdings having declined from $3,500,000 on December 10, 1948 to $2,000 on July 11, 1950; *second,* that his speculations have been largely financed by loans from the Florida National Bank at Miami, which is controlled by the St. Joe Paper Company; and, *third,* that the other members of the Group have, or have had, loans from one or more of the banks which are members of the Florida National Group of Banks, controlled by St. Joe-duPont.

It would be a travesty to treat the petitioners as spokesmen for the minority bondholders.

ARGUMENT

THE PETITIONERS' REASON 1.

The petitioners' Reason 1 (p. 17-18) involves the first question which was presented by the petitioners in No. 670 (see the respondent's brief in No. 670, p. 25-46).

The petitioners stress the alleged novelty of the question which they say is presented. But in order to be able to say that the question is novel they find it necessary to state the question in such a way as to make an apparent distinction between the Plan in this case and the plan involved in *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.* (C. C. A. 2, 1947) 161 F. 2d 413, cert. den. *Protective Committee for Bonds of Old Colony Railroad Co.* v. *New York, New Haven & Hartford Railroad Co.* (1947) 331 U. S. 858, rehearing denied (1947) 332 U. S. 803, which is referred to in the respondent's brief in No. 670 at page 39. Consequently they refer to the Atlantic Coast Line as "an unaffiliated, wholly unrelated railroad, which is not being reorganized under § 77 or otherwise". But

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they do not say what difference it makes that the Atlantic Coast Line is not affiliated with the Florida East Coast or is not being reorganized. And, as has been pointed out in the respondent's brief in No. 670 (p. 38-39), the arguments advanced against the Commission's Plan in this case would, if valid, apply to the plan in the *Old Colony* case.

The petitioners contribute the thought that the words "another corporation or corporations" in Section 77 (b)(5) should be construed to mean "another corporation or corporations *organized or to be organized for the purpose of carrying out the plan* (emphasis supplied by the petitioners) because the italicized words will be found in the second sentence of subsection (f).

It hardly seems necessary to say more than that the italicized words are in Section 77 (f) but not in Section 77 (b)(5). It must be assumed that the Congress put them in Section 77(f) and left them out of Section 77(b)(5) intentionally. As the Commission said (267 I. C. C. 730), if the Congress had intended to restrict the broad provision of Section 77(b)(5), "the assumption is that it would have added the necessary language to make effective that restriction".

The petitioners' argument (p. 18) that the provision of Section 77(b)(5) was "merely intended to preserve and authorize the established equity device of organizing a corporation or corporations as a means for the execution of a plan" is refuted by the explicit language of Section 77(b)(5), which refers not only to a transfer but also to a "merger or consolidation". The "established equity device" did not involve either a merger or a consolidation—it involved a sale to a new corporation organized to carry out a plan. So far as we know, there has *never* been a case in equity (or, for that matter, in Section 77) in which a new corporation was formed and then the debtor was merged into or consolidated with the new corporation. There can be no doubt that when the Congress adopted the language

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of Section 77(b)(5) it had in mind much more than the "established equity device".

Section 77(b)(5) relates to what a plan can do. The second sentence of Section 77(f), on which the petitioners rely, contains a grant of power to execute a plan. The petitioners make no effort to show that it is not entirely logical to have different provisions in the two subsections.*

If the words in the second sentence of Section 77(f) could be deemed to restrict the provisions of Section 77(b)(5), then the plan of reorganization of the Alton, under which the Alton was transferred to the Gulf, Mobile & Ohio, was wholly unauthorized. *Alton Railroad Company Reorganization* (1945) 261 I. C. C. 343. And it is interesting to note that on March 27, 1953, in *New Jersey & New York Railroad Company Reorganization,* Finance Docket 13490, the Commission (by Division 4) approved a plan for the reorganization of The New Jersey and New York Railroad Company under which the debtor's properties would be transferred to Erie Railroad Company; if the petitioners' contention were sound, that plan too would be unauthorized.

THE PETITIONERS' REASON 2.

The petitioners' Reason 2 is stated as follows (p. 18-19):

> "The Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The departures were: First, the failure of the Court of Appeals to decide petitioners' contention that § 77 of the Bankruptcy Act,

* There would seem to be much stronger reason for uncertainty as to the effect of the second sentence of Section 77(f) than for doubt as to the effect of Section 77(b)(5). Actually the practice has been for reorganization managers, rather than debtors, to carry out plans pursuant to court orders. The provision of the Plan in this case, that the reorganization managers "shall carry out the plan under the supervision and control of the court" (282 I. C. C. 225). is the conventional one under which many Section 77 plans have been carried out, frequently over the active opposition of debtors.

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as construed, violates the due process and eminent domain clauses in the Fifth Amendment; second, the failure of the Court of Appeals to give any consideration to the rights and equities of the minority bondholders, as distinguished from those of the majority bondholder."

The Alleged Constitutional Question.

Prior to this Court's decision in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495 it was vigorously argued that *Louisville Joint Stock Land Bank* v. *Radford* (1935) 295 U. S. 555 established that the bondholders had a constitutional right to a foreclosure sale.*

The *Denver & Rio Grande* decision effectively disposed of any argument that a plan such as the present Plan would be unconstitutional. This Court said (328 U. S. p. 533):

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* The argument made by the St. Joe Paper Company was summarized in the Commission's Third Supplemental Report, dated April 8, 1947, as follows (267 I. C. C. 303, footnote omitted):

> "The St. Joe Paper Company contends that, in the absence of full payment of the first and refunding bondholders' claim or of a public sale of the debtor's properties at an upset price fixed by us, these bondholders are entitled upon reorganization to possession of all the properties of the debtor including its cash on hand. It further asserts that any interpretation of the powers conferred upon us and the court by section 77 which would permit of a denial of this right to the bondholders over their objection (and in the absence of an exercise of the right of eminent domain) would violate the fifth amendment of the Constitution. The St. Joe Company bases its argument fundamentally on the decision of the United States Supreme Court in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555."

The *Denver & Rio Grande* case was decided on June 10, 1946. While the Third Supplemental Report was issued later and refers to the *Denver & Rio Grande* decision (267 I. C. C. 304), the paragraph from the Report which we have quoted summarizes the contention pressed by the St. Joe Paper Company in its brief filed in February, 1946, after the November, 1945, hearings and before the *Denver & Rio Grande* opinion was issued.

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> "We think that the provisions for confirmation by the courts over the creditors' objection are within the bankruptcy powers of Congress. Those powers are adequate to eliminate claims by administrative valuations with judicial review and they are adequate to require creditors to acquiesce in a fair adjustment of their claims, so long as the creditor gets all the value of his lien and his share of any free assets.[36]

[36] *Wright* v. *Union Central Ins. Co.*, 311 U. S. at 278, and discusion at p. 509, *supra.*

After *Denver & Rio Grande* had been decided, the references in this case to any possible constitutional question became more in the nature of hints that there might be a question than arguments that a plan such as the present Plan would involve a violation of the Fifth Amendment (see, for example, the petition in No. 670 at p. 26).

Judge SIBLEY said that his conclusion made it "unnecessary to determine whether the Court's power in bankruptcy could be extended to force a merger consistently with the Fifth Amendment" (V, 476; 81 F. Supp. 932). Judge RUSSELL used identical language except that he said that there was "a serious constitutional question" (II, 732-733; 201 F. 2d 331).

In both opinions as well as in the petitioners' brief the sole constitutional power mentioned is the bankruptcy power. There is no mention of the interstate commerce power. If there were any real doubt that the bankruptcy power is broad enough to cover authority for a "forced merger", it would be suitable to consider the scope of the interstate commerce power. Compare *North American Company* v. *Securities and Exchange Commission* (1946) 327 U. S. 686, 709-710.

However, this Court's holding in *Denver & Rio Grande*, following the decision in *Wright* v. *Union Central Life Insurance Company* (1940) 311 U. S. 273, left no doubt as to the extent of the bankruptcy power, even if that were to be

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taken by itself. After the *Denver & Rio Grande* decision a transfer of mortgaged property was made, over the objection of a majority in amount (of those voting) of the mortgage bondholders, in each of two cases: *In re Chicago, R. I. & P. Ry. Co.* (C. C. A. 7, 1947) 160 F. 2d 942; cert. den. *Chase National Bank, Trustee* v. *Cheston* (1947) 332 U. S. 793, rehearing denied (1947) 332 U. S. 826 and *Old Colony Bondholders* v. *New York, N. H. & H. R. Co.* (C. C. A. 2, 1947), 161 F. 2d 413, cert. den. *Protective Committee for Bonds of Old Colony Railroad Co.* v. *New York, New Haven & Hartford Railroad Co.* (1947), 331 U. S. 858, rehearing denied (1947) 332 U. S. 803. If there were any constitutional bar to the Commission's Plan, then the same bar would have stood in the way of the transfer of the property subject to the Little Rock and Hot Springs Western First Mortgage in the reorganization of the Rock Island and the transfer of the property subject to the Old Colony Railroad First Mortgage in the reorganization of the New Haven. For, even if on a question of statutory construction a distinction could be made that the Atlantic Coast Line Railroad Company is "an unaffiliated, wholly unrelated railroad", no such distinction could have any significance in determining the constitutional power of the Congress.

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The petitioners refer (p. 20) to "the proposed taking of their property by Coast Line, at a price which has never been determined to be its present fair value, for compensation which is not payable in cash".

We are at a loss to know the meaning of their statement that the "price" has never been determined to represent the "present fair value" of the property, particularly in view of the findings of the Court of Appeals.

With respect to the complaint that the compensation is not payable in cash, any contention that bondholders in a railroad reorganization can insist on cash—that is, on dollars rather than on securities—has been an anachronism

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since this Court's decisions in the *Western Pacific, Milwaukee* and *Denver & Rio Grande* cases. In this connection it is sufficient to refer to the parts of the *Western Pacific* and *Milwaukee* opinions which are cited in the footnote at page 13 of the respondent's brief in No. 702. It is unnecessary to add that the Florida East Coast bondholders fare better under the Commission's Plan, which provides for Atlantic Coast Line securities, than they would under a plan providing for a payment only in dollars—dollars have fluctuated downward in terms of what dollars will buy since the Commission approved the Plan in 1951, whereas Atlantic Coast Line securities, particularly Atlantic Coast Line Common Stock, have fluctuated upward in terms of dollars.*

The alleged failure of the Court of Appeals to consider the rights of the minority bondholders.

The petitioners really argue two propositions.

First, they say (p. 21) that the Court of Appeals disregarded Judge STRUM's holding that the Plan "unjustly and inequitably subordinates the rights of the 5% bondholders, *particularly the $20,000,000 of minority bonds*" (emphasis supplied by petitioners). That proposition has been discussed above at pages 3-5.

If, as the Court of Appeals found, the Plan is favorable to the bondholders as a class, how can it be unfair to the so-called minority? And how can it be said that the Court of Appeals disregarded the rights of a minority of a class,

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* The Commission found the fair market value of the securities which would be issued under the Plan based on the level of security prices prevailing on May 25, 1951 (282 I. C. C. 157, 162-163). The market value of the Atlantic Coast Line Railroad Company Common Stock at that time was 64. The price put by the Commission on the Participating Cumulative Convertible Preferred Stock was 70; that stock, being convertible into Common Stock, would be bound to sell at a price at least as high of the Common Stock. At the present time the market price of the Common Stock is well over 100 and the Participating Cumulative Convertible Preferred Stock would also sell at over 100.

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when the Court made explicit findings that the Plan is fair, if not generous, to the whole class?

Second, the petitioners suggest that Judge STRUM had a discretionary power which the Court of Appeals ignored (p. 21-22). The Lynch Interests made a similar suggestion in No. 702 and we refer to the respondent's brief therein (p. 4-11).

THE PETITIONERS' REASON 3.

The petitioners' Reason 3 seems to be a consolidation of Reasons 1 and 2, with the addition of an assertion that the questions presented are of "paramount importance" and a contention that the "stated purpose of the plan is to preclude realizing the highest possible sale price for the bondholders' security" (p. 23).

In support of the latter extraordinary contention the petitioners quote a statement made by the Commission, in its Third Supplemental Report in 1947, in support of its refusal to direct a foreclosure in connection with the Previous Plan (p. 22). The gist of the Commission's 1947 statement was that, if there were a judicial sale, "the Coast Line obviously could not successfully compete in bidding with the debtor's first and refunding bondholders". It is immaterial whether or not the Commission was correct in making this statement in 1947, as it does not appear that either the statement, or any thought that lay behind the statement, influenced what the Commission did in 1951.

Moreover, the petitioners' effort to make something of the Commission's statement compels them to rely on the mistaken hypothesis that a judicial sale would result in a higher "price" than the Commission's Plan provides and that the result of the Commission's failure to provide for a judicial sale "is to preclude realizing the highest possible sale price for the bondholders' security and to limit the sale price to so-called reorganization value expressed in terms of Coast Line securities" (p. 23).

This superficially plausible hypothesis can be tested in the light of experience with foreclosure sales of railroads.

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When at the instance of the petitioners Judge STRUM directed the dismissal of the proceeding, he said that one of the purposes was to "enable the Atlantic Coast Line, the 5% bondholders, the employees, and any other interested persons, to bid for the property at a public, competitive sale" (I, 167; 103 F. Supp. 847). But in more than 50 years there apparently has never been a single instance of a true "public, competitive sale" of a railroad. *Weiner, Conflicting Functions of the Upset Price in a Corporate Reorganization,* 27 Col. L. Rev., 132, 137 (footnote 28); *Dewing, The Financial Policy of Corporations,* The Ronald Press Company, Revised Edition, p. 964.

There is no reason to suppose that, if there were an attempt in this case to have a "public, competitive sale", there would be more than two possible bidders: (1) a corporation controlled by the St. Joe Paper Company and (2) the Atlantic Coast Line Railroad Company. If either were eliminated by a failure to get Interstate Commerce Commission authority or because of the difficulty of financing the cash requirements of the purchase, the other would be left as the sole potential bidder and the so-called "minority bondholders", for whom these petitioners purport to speak, would be left pretty much at the mercy of the sole bidder.*

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* We argued before Judge STRUM that any corporation controlled by the St. Joe Paper Company would be eliminated from the bidding because it would need Commission authority under Section 5(2) of the Interstate Commerce Act to acquire the Debtor's property, *Minneapolis & St. Louis Railroad Company Reorganization* (1941) 244 I. C. C., 357, 360, and that in view of the Commission's decisions in this case it was necessary to presume that the Commission would deny such authority. Judge STRUM did not pass on the point.

Presumably what the Commission said in its 1947 report was the result of an assumption that it would be difficult for the Atlantic Coast Line to make a *cash* bid for the Florida East Coast, while the cash requirements which the St. Joe Paper Company would have to meet would be greatly reduced because of its bondholdings. A principal difficulty about making a *cash* bid would involve the time factor. It is difficult to see how it would be possible to avoid an underwriting commitment which would run for a substantial period of time and involve heavy expense if obtainable at all.

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There is simply no basis for the assumption that the "minority bondholders" would be better off if there were a "public, competitive sale". They would run a real risk of being very much worse off.

The real protection which holders of railroad securities have in railroad reorganizations, whether in Section 77 or in equity, consists of the legal requirements for determinations of fairness, whether by the Interstate Commerce Commission or by the Court. A judicial sale is a mere device.

As long ago as in 1922, in *Reorganization—The Next Step,* 22 Col. L. Rev. 14, James N. Rosenberg accurately and colorfully described the function of a foreclosure sale while urging a change in the equity practice much along the line later followed by the Congress when it enacted Section 77. In discussing the suggested change he said (p. 26):

> "What then becomes of that sacrosanct proceeding, the foreclosure which takes place so frequently as a part of reorganization? Sacrosanct? It is a matter of practice merely. If a sale is but a 'step in reorganization,' why not bury the foreclosure among the ancient relics of outworn practice? Why not a sale free of liens as in bankruptcy practice? The safeguards of foreclosure were not intended for the benefit of creditors, but for the protection of the holder of the equity of redemption. Forward-looking lawyers have torn down many exacting structures of technique. Trover, writs of disseizin, enfeoffment, confession and avoidance, rejoinder and surrejoinder—the very words are strange to the modern lawyer's ears. As technique in art is but the servant of beauty, so technique, practice, procedure in the law are but the handmaids of Justice—otherwise the law becomes a vain and empty ritual."

THE PETITIONERS' REASON 4.

The petitioners' Reason 4 (p. 24-25) relates to the absolute priority rule and in connection with it we refer to the respondent's brief in No. 702 (p. 11-15).

The key word which is quoted and used by the petitioners is "receive". They quote parts of sentences from the *Denver and Rio Grande* and *Western Pacific* opinions which use the word "receive". They then speak of what the Atlantic Coast Line will "receive".

If the quotations from the *Denver and Rio Grande* and *Western Pacific* opinions be read in context, it will be immediately apparent that they relate to the distribution among several classes of creditors, which have claims against a particular property, of what is received for that property under a plan. In other words, in both instances this Court was enunciating the absolute priority rule as *a rule of distribution,* and that, of course, is what it is.

In this case there is no issue which involves any question of distribution. What is received under the Plan for the mortgaged properties goes to the mortgagees and, since the First Mortgage will be paid off, all of it goes to the holders of the First and Refunding Mortgage Bonds. What is received for the unmortgaged assets goes to the unsecured creditors (including the secured creditors to the extent that they are entitled to be treated as unsecured creditors).

As a junior creditor the Atlantic Coast Line will not receive anything except in respect of the unmortgaged assets.

The petitioners say that "the junior claim will receive all of debtor's property" (p. 25). It is true that the Atlantic Coast Line will acquire all of the Debtor's property. It is also true that it is the holder of a junior claim. But it is not correct to say that "the junior claim will receive all of debtor's property". For whatever properties are

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transferred to the Atlantic Coast Line, it will provide a consideration, in cash and securities, which has been determined to be the equivalent of what will be transferred to it.

CONCLUSION.

The petition should be denied.

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